Supreme Court, U.S.
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No. 93-1872

In the Supreme Court of the United States

OCTOBER TERM, 1994

ANTONIO CAMACHO, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

DREW S. DAYS, III
Solicitor General
FRANK W. HUNGER
Assistant Attorney General
LAURI STEVEN FILPPU
JOSEPH F. CIOLINO
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the time an alien spends in the United States in a nonimmigrant status can count toward the "seven consecutive years" of "lawful unrelinquished domicile" required to establish eligibility for discretionary relief under 8 U.S.C. 1182(c) (1988 & Supp. IV 1992).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A23) is unpublished, but the decision is noted at 15 F.3d 1083 (Table). The decisions of the Board of Immigration Appeals (A.R. 409-411; Pet. App. B2-B8) are unreported.[1]

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[1] The appendix to the petition includes the decision of the Board of Immigration Appeals denying petitioner's motion to reopen (which does not primarily relate to the question he presents for review), but it does not include the Board's earlier decision dismissing petitioner's appeal, which does address the issue that petitioner seeks to bring before this Court. Our citations to the Board's decision dismissing petitioner's appeal will accordingly be to the certified administrative record (A.R.) filed with the court of appeals.

JURISDICTION

The judgment of the court of appeals was entered on February 2, 1994. The petition for a writ of certiorari was filed on May 2, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a native and citizen of the Philippines who entered the United States in July 1970 as a nonimmigrant exchange visitor under 8 U.S.C. 1101(a)(15)(J) (1970), which covered, *inter alia*, "an alien having a residence in a foreign country which he has no intention of abandoning who is a bona fide * * * trainee * * * [or] specialist * * * who is coming temporarily to the United States * * * for the purpose of * * * receiving training."[2] A.R. 40. In June of 1982, petitioner became a lawful permanent resident alien. *Ibid.* In September 1984, he was convicted in an Illinois state court of narcotics racketeering and unlawful delivery of a controlled substance (deladin). See Pet. App. B2; A.R. 483, 486.

2. In November 1984, the Immigration and Naturalization Service (INS) charged petitioner with being deportable from the United States under 8 U.S.C.

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[2] INS records indicate that petitioner entered the United States as a medical resident in pathology. In November 1976, petitioner's status was adjusted to another nonimmigrant status under 8 U.S.C. 1101(a)(15)(H)(i) (1976). At all times relevant to petitioner's case, the latter statute required that petitioner have a residence in a foreign country, which he had no intention of abandoning, and that he be temporarily in the United States to perform the services provided for by his status. The statute was later amended substantially by Section 205(c)(1) and (e) of the Immigration Act of 1990 (IMMACT), Pub. L. No. 101-649, §§ 205(c)(1) and (e), 104 Stat. 5020, 5022.

1251(a)(11) (1982), as an alien convicted of violating a law "relating to the illicit possession of or traffic in narcotic drugs."[3] Petitioner's initial deportation hearing took place in February, 1985. A.R. 436-438. After several continuances, petitioner, at a hearing held on May 12, 1986 (approximately four years after petitioner became a lawful permanent resident), was found deportable as charged. He then requested relief under 8 U.S.C. 1182(c) (1988 & Supp. IV 1992), which authorizes the Attorney General to grant certain discretionary relief to "[a]liens lawfully admitted for permanent residence * * * [who have] a lawful unrelinquished domicile [in the United States] of seven consecutive years."[4] A.R. 465-466. Although petitioner had not been a lawful permanent resident for seven years, he contended that he could satisfy the seven-year requirement by relying on his residency in this country before he became a permanent resident. A.R. 466. The immigration judge, relying on *In re Anwo*, 16 I. & N. Dec. 293 (B.I.A. 1977), petition for review on other ground denied, *Anwo* v. *INS*, 607 F.2d

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[3] This provision was renumbered by IMMACT, § 602, 104 Stat. 5077-5082, and now appears as 8 U.S.C. 1251(a)(2)(B) (Supp. IV 1992). The amendment does not apply to deportation proceedings, such as petitioner's, that were commenced before March 1, 1991. See IMMACT § 602(d), 104 Stat. 5082.

[4] Although 8 U.S.C. 1182(c) on its face authorizes the Attorney General only to admit aliens returning to a lawful domicile in this country, the Board of Immigration Appeals and various courts of appeals have concluded that the Section also authorizes the Attorney General to grant relief from deportation. See *Tapia-Acuna* v. *INS*, 640 F.2d 223, 224-225 (9th Cir. 1981); *Francis* v. *INS*, 532 F.2d 268, 270-273 (2d Cir. 1976); *In re Silva*, 16 I. & N. Dec. 26, 28-30 (B.I.A. 1976); see also 16 I. & N. Dec. at 32 (Appleman, concurring) (noting that this interpretation of Section 1182(c) "may be desirable, but it is not what Congress wrote, nor what it intended").

435 (D.C. Cir. 1979), rejected that contention and found that petitioner had failed to meet the seven-year requirement. A.R. 430.

3. In a decision dated August 28, 1991, the Board of Immigration Appeals dismissed petitioner's appeal. A.R. 409-411. The Board adverted to the Second Circuit's decision in *Tim Lok* v. *INS*, 548 F.2d 37 (1977), which held that an alien may possess a "lawful domicile" in the United States under 8 U.S.C. 1182(c) (1988 & Supp. IV 1992) without having been admitted for permanent residence. A.R. 410-411. The Board noted, however, that it had declined in *In re Anwo* to apply the *Tim Lok* decision in cases arising outside the Second Circuit. A.R. 411. Because petitioner's case then arose in the Seventh Circuit,[5] the Board held that *In re Anwo* was controlling. *Ibid.* Relying on its precedent and on *Castillo-Felix* v. *INS*, 601 F.2d 459 (9th Cir. 1979), the Board accordingly held that an alien's acquisition of seven years' lawful unrelinquished domicile under 8 U.S.C. 1182(c) (1988 & Supp. IV 1992) starts "with the date of admission for permanent residence and not before." A.R. 410. The Board further noted that on June 1, 1989, petitioner had accrued the requisite seven years prescribed in 8 U.S.C. 1182(c) (1988 & Supp IV 1992). The Board declined, however, to remand the case to the immigration judge to allow petitioner to apply for relief under Section 1182(c). A.R. 411. The Board pointed out that such reopening may not be had as of right upon a bare showing of statutory eligibility; rather, petitioner was required to show as well that he merited relief in the

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[5] By the time the Board ruled on petitioner's appeal, petitioner had moved from Illinois to California. For that reason, his appeal from the Board's decision was ultimately heard by the Ninth Circuit. See Pet. App. A20-A22.

exercise of discretion. Here, the Board noted, petitioner had been convicted of a controlled substances violation, which generally requires a showing of outstanding equities before relief will be granted; yet petitioner had not filed a motion to remand to attempt to show outstanding equities that might indicate he is worthy of a favorable exercise of discretion under Section 1182(c). A.R. 411.

4. In November 1991, petitioner filed a motion with the Board to reopen and remand, seeking 8 U.S.C. 1182(c) (1988 & Supp. IV 1992) relief. A.R. 114-143. Petitioner thereafter filed an amended motion to reopen and reconsider. A.R. 62-107. Relying on *INS* v. *Rios-Pineda*, 471 U.S. 444 (1985), the Board denied the motion. The Board determined that petitioner's original appeal was baseless, and that its only apparent purpose was to delay the final deportation order so petitioner could acquire the requisite seven years of lawful unrelinquished domicile in order to satisfy his statutory eligibility for discretionary relief under 8 U.S.C. 1182(c) (1988 & Supp. IV 1992). A.R. 2-6 (Pet. App. B1-B8).

5. The court of appeals denied a petition for review. Pet. App. A1-A23. The court noted that with the exception of the Second Circuit's *Tim Lok* decision, all courts of appeals that have considered the issue have agreed that the seven-year period of "lawful unrelinquished domicile" under 8 U.S.C. 1182(c) (1988 & Supp. IV 1992) cannot begin until the alien becomes a lawful permanent resident. Pet. App. A12-A13. The court concluded that in light of the long history of Board precedent and the general consensus of reviewing courts, including its own decision in *Castillo-Felix*, the Board had acted properly in rejecting petitioner's reliance on *Tim Lok*. Pet. App. A14.

With respect to the Board's denial of petitioner's motion to reopen, the court concluded that it was not unreasonable for the Board to conclude that petitioner had pursued his "decade-long litigation" for the purpose of meeting the seven-year requirement under the statute. Pet. App. A22-A23. The court explained that petitioner's tactic was properly condemned by the Board, since "[t]he purpose of an appeal is to correct legal errors which occurred at the initial determination of deportability; it is not to permit an indefinite stalling of physical departure in the hope of eventually satisfying the legal prerequisites." Pet. App. A16, quoting *INS* v. *Rios-Pineda*, 471 U.S. at 450.

ARGUMENT

Petitioner renews his contention that the seven-year period prescribed by 8 U.S.C. 1182(c) (1988 & Supp. IV 1992) may commence before the alien becomes a lawful permanent resident of the United States.[6] The court of appeals correctly rejected that claim. Although the Second Circuit has rejected the Board's methodology for calculating the seven-year period under Section 1182(c), petitioner would not be entitled to relief under the Second Circuit's decisions, or under the decisions of any

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[6] While petitioner's appendix reproduces the Board's order denying his motion to reopen (Pet. App. B1-B8), neither the question presented nor the body of the petition appears to challenge the Board's and the court of appeals' conclusion that the motion was properly denied as a matter of discretion, in accordance with *Rios-Pineda*. Thus, the only question before the Court relates to petitioner's contention that the seven-year requirement may be satisfied by periods of residency that occur before an alien acquires permanent resident status. See Sup. Ct. R. 14.1(a); *Kaisha* v. *U.S. Philips Corp.*, 114 S. Ct. 425 (1993) (per curiam).

other court of appeals. Accordingly, review is not warranted in this case.

1. The language of the statute, considered in light of the context in which the statute was enacted and the consistent course of administrative interpretation, supports the decision of the court of appeals. The statute provides only that "[a]liens lawfully admitted for permanent residence * * * who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General." 8 U.S.C. 1182(c) (1988 & Supp. IV 1992). In our view, it is logical to assume that the reference to the unrelinquished domicile as "lawful"—following closely on the initial clause, which limits the provision to aliens "lawfully" admitted for permanent residence—is intended to tie the circumstances in which an alien can establish the requisite type of domicile to the alien's immigration status. As a result, the alien can establish the required residency period only by means of a domicile established after the alien is "lawfully admitted for permanent residence"; any domicile established when an alien is not "lawfully admitted for permanent residence" cannot be "lawful."

That reading of Section 1182(c) gains support from the circumstances of its enactment. The provision—enacted as part of the Immigration and Nationality Act of 1952 (INA), ch. 477, § 212(c), 66 Stat. 187—replaced the "Seventh Proviso" to Section 3 of the Immigration Act of 1917, which granted similar relief to "aliens returning after a temporary absence to an un-relinquished United States domicile of seven con-secutive years." Act of Feb. 5, 1917, ch. 29, 39 Stat. 878. The Senate Report that preceded enactment of the INA made it clear that the purpose of the revised provision was to limit the Attorney General's discretion to grant relief to aliens

"who came in the front door, were inspected, lawfully admitted, established homes here, and remained for 7 years before they got into trouble." S. Rep. No. 1515, 81st Cong., 2d Sess. 382 (1950). To accomplish this purpose, Congress revised the 1917 statute in two ways: (1) by adding the initial clause, which limits eligibility to "[a]liens lawfully admitted for permanent residence"; and (2) by adding the adjective "lawful" to qualify the types of unrelinquished domiciles that would support relief.

The Board considered the interpretation of Section 1182(c) shortly after the INA was enacted, in *In re S—*, 5 I. & N. Dec. 116 (B.I.A. 1953). In that case, the Board reviewed the legislative history of the 1952 revision to the Seventh Proviso and concluded that:

> [T]his provision of law is available only to those lawfully resident aliens who are returning to an unrelinquished domicile of 7 consecutive years subsequent to a lawful entry. In other words, we construe the section to mean that the alien must not only have been lawfully admitted for permanent residence but must have resided in this country for 7 consecutive years subsequent to such lawful admission for permanent residence; and that not only the admission must be lawful but that the period of residence must be lawful.

Id. at 118. The Board consistently has adhered to this interpretation. See, *e.g.*, *In re Anwo*, 16 I. & N. Dec. 293 (B.I.A. 1977), petition for review on other ground denied, *Anwo* v. *INS*, 607 F.2d 435 (D.C. Cir. 1979); *In re Newton*, 17 I. & N. Dec. 133 (B.I.A. 1979); *In re Kim*, 17 I. & N. Dec. 144 (B.I.A. 1979).[7] The Board's contempor-

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[7] The Board has not, however, adhered to this interpretation in cases arising in the Second Circuit, in deference to the contrary

aneous and longstanding interpretation is entitled to strong deference. See *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-845 (1984); *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 448 (1987); *Power Reactor Dev. Co.* v. *International Union of Elec. Workers*, 367 U.S. 396, 408 (1961). Because that interpretation is reasonable, it should prevail, and three courts of appeals in fact have sustained the Board's position. See *Castillo-Felix* v. *INS*, 601 F.2d 459 (9th Cir. 1979) (following *In re Anwo*); *Chiravacharadhikul* v. *INS*, 645 F.2d 248, 250 (4th Cir.) (following *In re S—*), cert. denied, 454 U.S. 893 (1981); *Michelson* v. *INS*, 897 F.2d 465, 469 (10th Cir. 1990).

2. Petitioner correctly notes (Pet. 16-17) that the Second Circuit adopted a contrary view in *Tim Lok* v. *INS*, 548 F.2d 37 (1977) (*Lok I*). Acknowledging the difficulty of the problem, see *id.* at 38, the *Lok I* court rejected the Board's interpretation and concluded that any unrelinquished domicile that did not violate the immigration laws would satisfy Section 1182(c), even if the domicile was established while the alien was not lawfully admitted for permanent residence. See 548 F.2d at 39-40. In a second opinion dealing with Tim Lok's case, however, the Second Circuit substantially limited the import of its decision in *Lok I*. See *Tim Lok* v. *INS*, 681 F.2d 107 (1982) (*Lok II*). The court in *Lok II* explained that an alien can establish domicile in the United States only by "establish[ing] an intent to remain." *Id.* at 109. Furthermore, he can "establis[h] *lawful* domicile only when his intent to remain [is] legal under the immigration laws." *Ibid.* Because Tim Lok's initial presence in the United States was unlawful, he

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interpretation adopted by the Second Circuit in *Tim Lok*. See *In re Anwo*, 16 I. & N. Dec. at 298.

could not establish a lawful domicile. Accordingly, the Second Circuit denied Tim Lok's petition for review.

The limited reach of the Second Circuit's rule is evident from decisions of the Third, Fifth, Eleventh, and District of Columbia Circuits, which have recognized the differing approaches and yet—without deciding whether the Board's interpretation or the Second Circuit's should prevail—have denied petitions for review of Board orders in cases like this one on the theory that nonimmigrant visitors cannot establish a "lawful" domicile. *Graham* v. *INS*, 998 F.2d 194, 195-196 (3d Cir. 1993) (temporary worker); *Madrid-Tavarez* v. *INS*, 999 F.2d 111, 112 (5th Cir. 1993) ("[A]n alien student, by the terms of his student visa, could not lawfully possess an intent to remain in the United States; but if the student did in fact form such an intent, then he was in violation of his visa and was not here lawfully"); *Brown* v. *INS*, 856 F.2d 728, 730-731 (5th Cir. 1988) (student visitor); *Melian* v. *INS*, 987 F.2d 1521, 1524-1525 (11th Cir. 1993) (visitor for pleasure); *Anwo* v. *INS*, 607 F.2d 435, 437-438 (D.C. Cir. 1979); see also *Lok II*, 681 F.2d at 109 n.3 (noting that nonimmigrant students cannot acquire a lawful domicile). Because petitioner's status—first as a nonimmigrant exchange visitor and later as a nonimmigrant alien of "distinguished merit and ability"—similarly depended on his "having a residence in a foreign country which he has no intention of abandoning" and on his "coming temporarily to the United States" in the status prescribed, 8 U.S.C. 1101(a)(15)(J) (1970) and (H)(i) (1976), he also could not acquire a domicile in the United Sates without violating his immigration status. See *Elkins* v. *Moreno*, 435 U.S. 647, 665 (1978) (explaining that provisions of Section 1101(a)(15) that condition admission on "an intent not to abandon a foreign residence * * * by implication

[require] an intent not to seek domicile in the United States"). Accordingly, petitioner would not have prevailed even in the Second Circuit. Hence, this case presents no occasion for the Court to resolve the conflict on which the petition relies.[8]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

LAURI STEVEN FILPPU
JOSEPH F. CIOLINO
Attorneys

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[8] The Court has twice recently denied certiorari petitions seeking resolution of the same conflict. See *Okpala* v. *INS*, 114 S. Ct. 1217 (1994); *McBride* v. *INS*, 112 S. Ct. 1558 (1992).